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ISMAIL AHAMAD

v.

SURUHANJAYA PASUKAN POLIS & ANOR

B

HIGH COURT MALAYA, PULAU PINANG
BALIA YUSOF WAHI J
[ORIGINATING MOTION NO: 25-60-2004]
10 FEBRUARY 2009

C ***ADMINISTRATIVE LAW:*** *Judicial review - Application for - Duty of the court - Whether court competent to consider merits of the case - Whether court competent to question punishment imposed by disciplinary authority*

D ***ADMINISTRATIVE LAW:*** *Rights and liabilities of public servants - Disciplinary action - Disciplinary proceedings against public officer in respect of a criminal conviction - Whether public officer enjoyed a right to be heard in disciplinary proceedings against him - Federal Constitution, art. 135(2) proviso*

E ***CONSTITUTIONAL LAW:*** *Double jeopardy - Federal Constitution, art. 7(2) - Whether doctrine of double jeopardy applicable to disciplinary matters*

PUBLIC SERVANTS: *Criminal offence - Close proximity - Whether a criminal offence warranting dismissal from service - Public Officers* F *(Conduct and Discipline) Regulations 1993, reg. 33(1)*

PUBLIC SERVANTS: *Disciplinary proceedings - Procedure - Alternative modes of action and distinct procedures - Whether disciplinary authority entitled to proceed against public officer under reg. 33(1) of the Public Officers (Conduct and Discipline) Regulations 1993 in respect of a* G *criminal conviction*

PUBLIC SERVANTS: *Disciplinary proceedings - Procedure - Whether the right to be heard means the right to an oral hearing - Whether public officer convicted of a criminal offence has an opportunity to be heard in* H *disciplinary proceedings against him*

The applicant, a police Chief Inspector, had pleaded guilty to committing 'close proximity' or khalwat in the Penang Syariah Court and fined RM1,800. His superiors recommended to the Police Disciplinary Board ('the Board') that disciplinary action be taken I against him. He was subsequently notified by the Board that he had been dismissed. He applied to the High Court for judicial

review to *inter alia* quash the decision of the Board. In the High Court, counsel chose to pursue the following grounds: (i) there had been a procedural error by the Board by proceeding with disciplinary action against the applicant under reg. 33(1) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations') rather than under reg. 34(1); (ii) the applicant had not been given an opportunity to be heard; and (iii) having been convicted by the Syariah Court and then punished by disciplinary action, the applicant had been subject to double jeopardy.

Held (dismissing the application):

(1) Judicial review is not an appeal from a decision but a review of the manner through which the decision was made. The court is not entitled to consider whether the decision itself, on the merits of the facts, was fair and reasonable. Judicial review may be exercised on the ground of "illegality" or "irrationality" or on the ground of procedural impropriety. (para 6)

(2) Regulations 33(1) and 34(2) are two alternative modes of disciplinary action, with distinct procedures, that may be instituted against a public officer. Close proximity was a criminal offence and the Syariah Court a court under reg. 3 of the Regulations. There was nothing improper for the disciplinary authority to proceed against the applicant under reg. 33(1). (para 7)

(3) The right to be heard does not mean that there must be an oral hearing. Further, the proviso to art. 135(2) of the Federal Constitution clearly provides *inter alia* that the opportunity of being heard is not available to a member of the service who is dismissed on the ground of conduct in respect of which a criminal charge has been proved against him. In the instant case, the applicant had no right to be heard in view of his criminal conviction in the Syariah Court. (para 8)

(4) The doctrine of double jeopardy under art. 7(2) of the Federal Constitution does not apply to disciplinary matters. In the instant case, there was nothing wrong with the disciplinary action taken against the applicant based on the same facts in respect of which he had been convicted in the Syariah Court. (para 9)

(5) The disciplining of a public officer by his department head is part of the function of the executive branch of the government. It is beyond the function of a court to determine the punishment meted out on a public officer. It is not for the court to substitute its own view as to the appropriate penalty for the public officer's misconduct. (para 10)

Case(s) referred to:

Abdul Wahab Abdullah lwn. Ketua Polis Negara & Satu Lagi [2000] 3 CLJ 250 HC ***(refd)***

Council of Civil Service Union & Ors v. Minister for Civil Services [1985] AC 374 ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union Of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

Harry Lee Wee v. Law Society of Singapore [1984] 1 LNS 77 PC ***(refd)***

Leong Kum Fatt v. Attorney-General [1984] 1 LNS 5 HC ***(refd)***

Mah Wong Kit v. Real Exhibition Sdn Bhd [2002] 1 MLJ 715 ***(refd)***

Minister Of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186 SC ***(refd)***

Mohamed Yusoff Samadi v. Attorney-General Of Singapore [1974] 1 LNS 97 HC ***(refd)***

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 FC ***(refd)***

Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam & Anor [2006] 2 CLJ 150 CA ***(refd)***

Zakaria Abdul Rahman v. Ketua Polis Negara Malaysia & Anor [2001] 6 CLJ 273 HC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 7(2), 135(2)

Public Officers (Conduct and Discipline) Regulations 1993, reg. 3, 29(2), 33(1), 34(2)

For the applicant - Mohd Ismail; M/s Ismail Khoo & Assocs

For the respondents - Effendi Nazila SFC

Reported by Andrew Christopher Simon

JUDGMENT

Balia Yusof Wahi J:

[1] The applicant, a former police officer with the rank of a Chief Inspector filed this application asking for the following reliefs:

(i) Bahawa pemohon diberi Perintah *Certiorari* membatalkan Perintah ekoran daripada Tindakan Tatatertib (PR) I/11520 yang dibuat pada 22/7/2004 oleh Pengerusi Lembaga Tatatertib, Polis Di Raja Malaysia.

(ii) Satu deklarasi bahawa pembuangan kerja Pemohon pada 22.7.2004 adalah tidak sah dari segi undang-undang.

(iii) Satu deklarasi bahawa prosedur yang digunakan oleh Lembaga Tatatertib, Polis Di Raja Malaysia adalah tidak sah dan untuk kes pembuangan satu pendengaran mesti diadakan dimana Pemohon berhak hadir dan dibantu oleh peguambela.

(iv) Satu deklarasi bahawa kesalahan yang dilakukan oleh Pemohon bukan kes jenayah.

(v) Satu deklarasi bahawa pemohon tidak diberi peluang untuk membuat rayuan.

(vi) Satu deklarasi bahawa Lembaga Tatatertib tidak mempunyai kuasa membuang kerja pemohon.

(vii) Bahawa Lembaga Tatatertib tidak mempertimbangkan hukuman yang lain di dalam peruntukan di bawah seksyen 29(2) Cap D – Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib).

(viii) Satu deklarasi bahawa surat yang ditandatangani buang kerja Pemohon tidak ditandatangan oleh pegawai yang berkuasa.

(ix) Satu perintah bahawa pemohon dikembalikan ke jawatan asalnya sebagai Inspektor dengan semua kelebihannya (benefit).

(x) Kos dan faedah mulai tarikh dibuang kerja.

(xi) Lain-lain perintah dan/relif yang Mahkamah anggap sesuai dan manfaat.

Facts

[2] On 27 July 2003 at about 2.45am, the applicant who was attached to the Cawangan Khas, Ibu Pejabat Polis Daerah Timur Laut, Pulau Pinang was arrested by a team of Religious Officers from the Jabatan Agama Islam Pulau Pinang for having committed the offence of close proximity (khalwat). He was charged for the same offence at the Syariah Court, Pulau Pinang and was fined in the sum of RM1,800 on his plea of guilty to the said charge.

[3] Subsequently, a report under Peraturan 29(2) of the Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 was prepared by the applicant's superiors and forwarded to the Lembaga Tatatertib at Bukit Aman recommending disciplinary action being taken against him with a punishment other than

dismissal or reduction in rank. On 14 November 2003, the applicant received a letter dated 13 October 2003 informing him that he has been interdicted with effect from 16 September 2003, the day he was convicted and fined by the Syariah Court Pulau Pinang. On 27 September 2004 the applicant was served with a letter dated 6 August 2004 from the Pegawai Lembaga Tatatertib Polis Di Raja Malaysia informing him that he was dismissed with effect from 22 July 2004, the day the decision was made by the Lembaga Tatatertib Polis Di Raja Malaysia.

[4] Applicant's Contention/Grounds Of Application

i) No opportunity of being heard.

ii) No reason given for his dismissal.

iii) No right of appeal.

iv) Close proximity is not a criminal offence within the meaning of Peraturan 29 Chapter D of the Peraturan-Peraturan Pegawai-Pegawai Awam (Kelakuan dan Tatatertib) 1993.

v) The Lembaga Tatatertib has failed to consider a lesser punishment other than dismissal.

vi) Double jeopardy.

vii) The Lembaga Tatatertib has no authority to dismiss and the letter informing him of the decision was signed by a person who has no such authority.

[5] Respondent's Contention/Reply

i) Applicant has no right to be heard and to show cause because the disciplinary action was initiated under Peraturan 29 and 33 of the Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 PU(A)395/2003 and the Federal Constitution.

ii) Grounds of dismissal sufficiently stated in the letter dated 6 August 2004 (exh. "1BA1" Lampiran 4).

iii) The Lembaga Tatatertib was properly constituted and chaired by the Pengerusi Lembaga Tatatertib Pegawai Kanan Polis (Kategori Inspektor) Polis Di Raja Malaysia.

iv) The Lembaga Tatatertib has considered other punishment under Peraturan 33 of the Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

v) Doctrine of double jeopardy is not applicable. A

vi) The offence of close proximity comes within the definition of criminal offence under Peraturan 3 of the Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

Decision B

[6] Judicial review is not an appeal from a decision but a review of the manner in which the decision was made. The court is not entitled to consider whether the decision itself on the merit of the facts, was fair and reasonable (See: *Harpers Trading (M) Sdn Bhd v. National Union Of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159). Judicial review may be exercised on the ground of "illegality" or "irrationality" or on ground of procedural impropriety (see: *Mah Wong Kit v. Real Exhibition Sdn Bhd* [2002] 1 MLJ 715, *Council of Civil Service Union & Ors v. Minister for Civil Services* [1985] AC 374, *Minister Of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara* [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186, *Leong Kum Fatt v. Attorney-General* [1984] 1 LNS 5). C D

[7] Although the applicant has put forth a number of grounds in his application, counsel however chose to proceed only on three main issues namely on the issues of procedural impropriety, right to be heard and double jeopardy. On procedural impropriety, the applicant's counsel contends that by classifying the action against the applicant under Peraturan 33(1) of the Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (hereinafter referred to as the said Peraturan) namely in categorizing the offence of close proximity as being a criminal offence a procedural error has been committed. The applicant contends that any disciplinary action to be taken against him must be instituted in accordance with Peraturan 34(1) of the said Peraturan. In my view this argument is too farfetched and without merits. Peraturan 33(1) and 34(2) are two alternative modes of disciplinary action that may be instituted against a public officer. They are two distinct procedures. It is beyond the scope and function of this court to enquire as to why one mode is preferred against the other by the applicant's superiors. On the contention of counsel that close proximity is not a criminal offence, I beg to differ. The definition of "criminal offence" as stipulated in Peraturan 3 and likewise the definition of "conviction" is self explanatory. For the sake of brevity, I deem it unnecessary to tabulate those definitions. The applicant in this case has been convicted by the Syariah Court Pulau Pinang and I have no doubt E F G H I

whatsoever that the Syariah Court is a "court" within the definition, again in Peraturan 3 of the said Peraturan. In the same vein, I am also satisfied that close proximity, an offence for which the applicant was found guilty and convicted, is a criminal offence within the meaning of that definition stipulated in the said Peraturan 3. In my view it is an offence which clearly fits into the category of "an offence involving moral turpitude". In that light, I do not see anything improper in the choice of the disciplinary authority to proceed against the applicant under Peraturan 33(1). For reference, the said Peraturan has been amended by the Peraturan-Peraturan Pegawai Awam (Kelakuan Dan Tatatertib) (Pindaan) 2002 (PU(A) 246/2002).

[8] It has been held in a number of authorities that the right to be heard accorded under the law does not mean that there must be an oral hearing (See: *Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara Malaysia* [1994] 2 CLJ 333). Further, art. 135(2) of the Federal Constitution, in its proviso clearly provides that such right is not available to among others, a member of the service who is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him. (See: *Abdul Wahab Abdullah v. Ketua Polis Negara & Satu Lagi* [2000] 3 CLJ 250, *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam & Anor* [2006] 2 CLJ 150). To put it simply, it means that the applicant in the instant case has no right to be heard. His dismissal was founded on the ground of being convicted for a criminal offence and para. (2) of Peraturan 34 of the said Peraturan clearly stipulates that the right to be heard provided in para. (1) of the same is not applicable to cases where an officer is dismissed or reduced in rank on the ground of being convicted of a criminal offence. His objection on this ground must therefore fail.

[9] Having been convicted by the Syariah Court for the offence of close proximity and now being subject to disciplinary action, the applicant is contending that he has been put in double jeopardy, a doctrine enshrined in art. 7(2) of the Federal Constitution. In support, the applicant relied on the authorities of *Zakaria Abdul Rahman v. Ketua Polis Negara Malaysia & Anor* [2001] 6 CLJ 273 and *Harry Lee Wee v. Law Society of Singapore* [1984] 1 LNS 77. My short comment on these two authorities cited by the learned counsel for the applicant is that both of these authorities do not lend support to the applicant's case. On the facts, both authorities refer to two disciplinary actions being taken against the plaintiff and that fact in itself clearly distinguishes these two authorities with the

instant case before me. The doctrine of double jeopardy under art. 7(2) of the Federal Constitution does not apply to disciplinary matters and this is clearly the view of the court in *Zakaria*'s case itself (See also: *Mohamed Yusoff Samadi v. Attorney-General Of Singapore* [1974] 1 LNS 97). I am of the considered view that there was nothing wrong with the disciplinary action taken against the applicant on the same facts in respect of which he has been charged and convicted by the Syariah Court in this case.

[10] To reiterate what has been stated in numerous authorities, a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment. It cannot be denied that the disciplining of a public officer by his department head is part of the function of the executive branch of the government and any usurpation by a court will be viewed with something very much more than disfavour even though the judiciary is the judicial branch of the government as well as an institution which belongs to the people (per Peh Swee Chin FCJ in *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405 at p. 413). In that light, it is beyond the function of this court to determine the punishment which is meted out on the public officer. The Federal Court in *Ng Hock Cheng v. Pengarah Am Penjara & Ors (supra)* has held that the court should not substitute its own view as to which was the appropriate penalty for the employee's misconduct, and whether the punishment should be a dismissal or a lesser penalty like a reduction in rank was not for the court to say. An employer, including a government, is the best person to judge the seriousness of misconduct of an employee.

[11] That would be sufficient answer to the applicant's contention on the issue of failure and the part of the disciplinary authority to consider a lesser punishment.

[12] Be that as it may, I am at the same time satisfied with the first respondent's reply in the "affidavit jawapan" in Lampiran 10, in particular at para. 12 explaining how the disciplinary board had considered the matter before deciding on the punishment to be meted out against the applicant. This was never controverted by the applicant and it is very clear that this was but a mere bare assertion by the applicant in his desperate attempt to nullify the disciplinary action against him.

[13] Finally, from the first respondents' "affidavit jawapan" in Lampiran 10 affirmed by one Tan Sri Mohd Bakri b. Hj. Omar who was the chairman of the Lembaga Tatatertib Pegawai Kanan Polis

A (Kategori Inspektor) Polis Di Raja Malaysia, I am satisfied that the disciplinary action taken against the applicant was properly instituted by a competent body. Reading paras 1 and 10 of the said affidavit, I can only conclude that it is beyond doubt that the disciplinary proceedings against the applicant was done in accordance with the B said Peraturan, and again, the applicant has neither proffered any evidence to show otherwise nor controvert the respondent's averment on this issue.

[14] The applicant's application for all the prayers sought as enumerated in the opening paragraph of this judgment is hereby C dismissed with costs.

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